COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2329-CR **Cir. Ct. No. 1991CF911478**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID L.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. David L. appeals from an order denying his motion for sentence modification. He argues that the trial court erroneously exercised its

discretion when it found that even though David L. had established the existence of a new factor, sentence modification was not warranted. We affirm.

BACKGROUND

¶2 In January 1991, when he was fifteen years old, David L. shot and killed Mario Gonzalez, a college student who David L. and two other men encountered as Gonzalez was carrying personal items from his car to his fraternity house. According to a citizen witness, David L. shot Gonzalez once as he was chasing him and then, when Gonzalez was lying on the ground, David L. shot Gonzalez in the head at close range. David L. took the radio Gonzalez was carrying and left the scene.

¶3 A jury found David L. guilty of first-degree intentional homicide and armed robbery, both as a party to a crime, contrary to WIS. STAT. §§ 940.01(1), 943.32(1)(a) and (2), and 939.05 (1991–92).[1] He was sentenced to life in prison for the first-degree intentional homicide, with a parole eligibility date of January 1, 2025. The trial court imposed a ten-year consecutive sentence for the armed robbery.[2] The convictions were affirmed on appeal.

¶4 In 2001, David L. filed a motion for sentence modification based on his cooperation with state and federal authorities who were prosecuting members of the Latin King criminal organization. Both the State and David L. recommended that David L.'s sentence be modified in two ways: (1) the parole

[1] All references to the Wisconsin Statutes are to the 2011–12 version unless otherwise noted.

[2] The Honorable Frank T. Crivello presided over the jury trial and sentenced David L.

eligibility date would be amended to January 1, 2012; and (2) the consecutive armed robbery sentence would be modified to a concurrent sentence. At the motion hearing, David L. presented testimony from a police department detective and a special agent of the FBI. The special agent said that David L. had "put himself at an extreme risk" by providing information about a witness who had been targeted for death and by testifying at a federal trial. The special agent said that David L. had been beaten for cooperating with authorities and was subsequently placed in a witness protection program. Friends and relatives of Gonzalez opposed the motion.

¶5 The trial court found that based on David L.'s cooperation with authorities, his sentence should be modified so that the armed robbery sentence runs concurrent with his other sentence.[3] The trial court rejected the request that the parole eligibility date be changed.

¶6 Nine years later, David L. filed the motion for sentence modification that is the subject of this appeal. He asked the trial court to make him eligible for parole immediately. David L. argued that his second sentence modification motion was justified by significant assistance that he provided to the federal government's prosecution of the Latin Kings in the years since his first sentence modification motion was granted in part. This assistance included testifying before a grand jury, debriefing with law enforcement, and recruiting other individuals to serve as witnesses for the government. David L. was also willing to testify at trial, but his testimony was not needed.

[3] The Honorable M. Joseph Donald presided over the 2001 motion for sentence modification.

¶7 Unlike in 2002, the State opposed the 2011 motion for sentence modification. It argued that David L.'s recent assistance to law enforcement should be considered when David L. is considered for parole, but that sentence modification was not warranted. The State's trial court brief discussed a letter written by the United States Attorney for the Eastern District that stated: "Based in part on [David L.'s] testimony, the grand jury returned an indictment charging nearly 50 gang members with RICO offenses." The State asserted that the letter lacked details concerning David L.'s grand jury testimony and debriefing that would indicate the significance of his assistance. The State suggested that the information David L. provided "had limited value, as [he] was not called [as] a witness and did not testify against the particular Latin King defendants who proceeded to trial." The State also indicated that the Gonzalez family opposed the modification.

¶8 In response, David L. submitted a second letter, which was written by the Criminal Division Chief of the United States Attorney's office. That letter indicated that in addition to the assistance David L. had recently provided, his prior trial testimony continued to be useful in defeating the appeals and motions for resentencing brought by numerous defendants.

¶9 At the motion hearing, the trial court considered the two-part test that applies to a sentence modification motion based on an alleged new factor: whether the defendant has demonstrated the existence of a new factor by clear and convincing evidence and, if so, whether "that new factor justifies modification of the sentence," which is a discretionary determination by the trial court.[4] *See* ***State***

[4] The Honorable Rebecca F. Dallet presided over the 2011 motion for sentence modification.

v. Harbor, 2011 WI 28, ¶¶36–37, 333 Wis. 2d 53, 72–73, 797 N.W.2d 828, 838. The trial court said that the court and the parties agreed that a new factor had been established and, therefore, "[t]he crux of where we are here is the second part."

¶10 The trial court, exercising its discretion, concluded that sentence modification was not justified. The trial court acknowledged that David L. had "put himself out there at the risk of his own life to benefit our community," but it concluded that the need for punishment and deterrence outweighed David L.'s assistance to law enforcement and his rehabilitation. The trial court stated:

> Even if I accept what [David L.'s lawyer] says in that [David L.] has truly rehabilitated himself to the extent that he could possibly do it, there is a punishment. There is a deterrence and a punishment and a community response to such a horrendous, terrible homicide that has to be significant, that was significant, that was significant according to Judge Crivello [at sentencing], significant according to Judge Donald [in 2002], and significant according to this court. And even tempered against what has been presented to me today, I don't believe that the modification is appropriate…. I think that it's not a level of help so great that taking away from the horribleness of this crime and the message and the response to this type of crime that was given to the community to [David L.] on the date of this sentencing needs to be changed. I think that certainly Judge Donald took into consideration and did give consideration for the … prior assistance and affected the … armed robbery, which is now concurrent. But for me to now say with respect to the homicide, this terrible homicide, cold blooded, heartless homicide that that needs to be changed, I don't see that what I have been given rises to the level that that needs to be changed. I think that there is a very thoughtful process that went on here that took into account some of the things [discussed] … at sentencing, which was the age and the peer pressure, and all those other things, but that this homicide was such that this punishment is the necessity for it. And so I am gonna deny the motion to modify sentence.

LEGAL STANDARDS

¶11 As noted, a sentence modification motion requires the trial court to apply a two-part test. *See* ***ibid.*** First, the trial court determines whether a new factor exists. ***Id.***, 2011 WI 28, ¶36, 333 Wis. 2d at 72, 797 N.W.2d at 838. "Whether a fact or set of facts presented by the defendant constitutes a 'new factor' is a question of law" that appellate courts review independently. ***Id.***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 N.W.2d at 837. Second, if the trial court determines that a new factor exists, it must decide whether sentence modification is justified.[5] *See* ***id.***, 2011 WI 28, ¶37, 333 Wis. 2d at 73, 797 N.W.2d at 838. "The determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and [appellate courts] review such decisions for erroneous exercise of discretion." ***Id.***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 N.W.2d at 837. This court "will sustain a discretionary determination if it is the product of a rational mental process and is 'demonstrably ... made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.'" ***State v. Verstoppen***, 185 Wis. 2d 728, 741, 519 N.W.2d 653, 658 (Ct. App. 1994) (citation omitted; ellipses in ***Verstoppen***).

DISCUSSION

¶12 The parties and the trial court agreed that David L.'s motion alleged facts that constitute a "new factor." *See* ***Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 74, 78, 797 N.W.2d 828, 838, 840 (reaffirming that "the correct

[5] Sentence modification is not the same as resentencing. *See* ***State v. Wood***, 2007 WI App 190, ¶9, 305 Wis. 2d 133, 141, 738 N.W.2d 81, 85. Sentence modification is appropriate to "correct specific problems," while resentencing is appropriate "when it is necessary to completely re-do the invalid sentence." ***Ibid.***

definition of a 'new factor' for purposes of sentence modification" is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties'") (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975)). This conclusion is supported by ***State v. Doe***, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101, which held that a court assessing whether assistance to law enforcement provided by the defendant could constitute a new factor for purposes of sentence modification could consider five factors, including:

> "(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance."

See ***id.***, 2005 WI App 68, ¶9, 280 Wis. 2d at 739–740, 697 N.W.2d at 105–106 (citation omitted). We will not disturb the trial court's conclusion that David L.'s cooperation with law enforcement established a new factor.

¶13 At issue in this appeal is the second part of the sentence modification test: the trial court's discretionary determination whether the new factor justifies sentence modification. *See* ***Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d at 71, 797 N.W.2d at 837. David L. presents several reasons why he believes the trial court erroneously exercised its discretion. We consider each in turn.

¶14 First, David L. argues that the trial court erroneously relied on the State's assessment of David L.'s cooperation, instead of the facts and assessment provided by the United States Attorney's office. Citing ***Doe***, he argues that the trial court erred when it evaluated "the significance and usefulness of the defendant's assistance" because it took into consideration the wrong "government's evaluation of the assistance rendered." *See* ***id.***, 2005 WI App 68, ¶9, 280 Wis. 2d at 740, 697 N.W.2d at 105. Underlying David L.'s argument is his assumption that the five factors outlined in ***Doe*** should be used to evaluate both whether a new factor has been established and whether that new factor justifies sentence modification. ***Doe*** stated: "We adopt these factors for the court's use in assessing whether the assistance constitutes a new factor," *see* ***id.***, 2005 WI App 68, ¶9, 280 Wis. 2d at 740, 697 N.W.2d at 106, but ***Doe*** did not address whether the trial court should consider those same factors when making its discretionary determination whether sentence modification is justified.

¶15 Nonetheless, even assuming that the five factors highlighted in ***Doe*** are relevant to the trial court's exercise of discretion, we reject David L.'s argument because we do not agree that the trial court failed to consider the recommendation of the United States Attorney. The trial court noted that the second letter from the United States Attorney's office suggested that David L. should again be given credit for his trial testimony in 1998 because that testimony was still being used to reject appeals. The trial court also discussed the first letter's assessment of David L.'s recent assistance, which included giving testimony before a grand jury, being debriefed, and recruiting others to assist law enforcement. The trial court acknowledged that the assistance was "helpful," but it said the assistance "wasn't of the level that he was able to give" in the past, which led to the first sentence modification. The trial court's thoughtful analysis

of David L.'s assistance—which spanned over six pages of the transcript—demonstrates that the trial court's "discretionary determination … [wa]s the product of a rational mental process" and was "'based upon the facts appearing in the record and in reliance on the appropriate and applicable law.'" *See* ***Verstoppen***, 185 Wis. 2d at 741, 519 N.W.2d at 658 (citation omitted; ellipses in ***Verstoppen***). We discern no erroneous exercise of discretion.

¶16 David L.'s second argument is that the trial court "erroneously exercised its discretion by creating a 'test' that unfairly compared the cooperation that formed the basis for David L.'s [first] sentence modification request … with the cooperation that formed the basis of the [second] sentence modification request." (Bolding and some capitalization omitted.) David L. asserts that the trial court:

> created a new test unrelated to the ***Doe*** factors regarding subsequent cooperation and whether subsequent cooperation warranted a sentence modification; to wit, for any subsequent sentence modification based upon further cooperation, the later cooperation must be equal to, or greater than, the value of the initial cooperation that originally warranted sentence modification.

We disagree that the trial court created any such test. The trial court was required to consider the facts to determine whether the new factor justified sentence modification. The trial court's comments reflect that it considered the cooperation David L. provided in the past and more recently, but it did not state that if David L.'s current cooperation was not greater than or equal to that provided before, he was not entitled to sentence modification. Rather, the trial court's comments reflect a consideration of many issues, including the level of David L.'s cooperation, his rehabilitation, the facts of David L.'s crime, and other factors. We reject David L.'s argument.

¶17 Next, David L. asserts that the trial court "seemed to suggest that without testimony at trial, a sentence modification was unwarranted." He states: "While testifying at trial may be a factor for a court to consider, testimony, in and of itself, cannot be the lynch pin that determines the value of David L.'s cooperation." We have reviewed the trial court's comments to which David L. is referring. We do not agree that the trial court stated that it categorically would not modify a sentence based on cooperation with authorities if a defendant did not testify at trial. Instead, the trial court's comments reflected its consideration of the extent of David L.'s cooperation and the value of the information that David L. provided.

¶18 Finally, David L. argues that the trial court erroneously exercised its discretion by focusing too much on the nature of his crime, which he acknowledges "will never change." Again, we disagree with David L.'s reading of the trial court's remarks. The trial court clearly considered numerous factors.[6] For instance, the trial court noted that David L. had gotten an education and had positively grown as a person. The trial court also considered the remarks of both the sentencing court and the court that modified David L.'s sentence the first time.

[6] In his reply brief, David L. asserts that the trial court was required to address the sentencing factors outlined in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Conversely, the State argues that "when a [trial] court is exercising its discretion whether to modify a sentence based on a new factor, it is not required to engage in a full consideration of all the factors that are relevant to sentencing." We decline to address this issue, because the transcript makes clear that the trial court did, in fact, consider the primary factors discussed in ***Gallion*** and its progeny: the gravity of the offense, the character of the offender, and the protection of the public. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d 695, 699. Indeed, the trial court explicitly stated that it had considered David L.'s cooperation with law enforcement and "the crime itself and all the factors that went into the initial sentence itself." Resolution of the parties' disagreement about which specific factors must be considered at a sentence modification hearing is unnecessary. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

Ultimately, the trial court concluded that the new factor—David L's most recent assistance to law enforcement, as well as the continuing value of his prior trial testimony—did not justify a sentence modification, in light of the seriousness of the original crime, the amount of assistance provided, and the fact that David L. had already benefitted from a sentence modification. We reject David L.'s argument that "[t]he only sentencing factor that [the trial court] considered and gave weight to twenty years after David L.'s crime was to punishment." The trial court did not erroneously exercise its discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.